No. 3321

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

R. L. SABIN, Trustee in Bankruptcy of the Estate of L. Judkis, bankrupt,
Appellant

vs

H. HORENSTEIN,
Respondent

BRIEF OF APPELLANT

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STATEMENT OF FACTS

L. Judkis, a merchant doing business as the American Clothing Company, on First Street, Portland, Oregon, carrying a stock of men's furnishings, clothing and shoes of about $11,000 to $12,000, was adjudged bankrupt on December 10th, 1917, upon a petition filed prior to that time.

During the months of August, September, October and November, 1917, in addition to his retail sales, he disposed of merchandise in lots to other merchants or speculators to an extent of approximately $6,000 to $8,000, at least. These

sales were made upon a rising market, for cash, and practically none of them at a profit. In most instances they were made at cost less freight. The goods thus sold were purchased on credit by the bankrupt and not paid for. The bankrupt had approximately sixty merchandise creditors, most of whom were wholesalers located in the East, and none of the purchases from any one of these wholesale houses amounted to more than $600, and most of them were from $100 to $300, the bankrupt buying from numerous houses carrying the same line of goods and scattering his purchases. (See List of Claims Filed and Allowed, Transcript p. 41.)

It is conceded that the bankrupt was endeavoring to defraud his creditors by this manner of conducting his business. Said the learned judge below in the course of his opinion:

> "I will say in passing that I have read the testimony in the bankruptcy matter, which has come up for review from the Referee in Bankruptcy, of Mr. Judkis, and there is no doubt in my mind but what Mr. Judkis was doing a fraudulent business; that is to say, he was attempting to defraud his creditors; and there are indications, taking into account the testimony of the witnesses who have purchased from Judkis, from which inferences may be drawn, that there were others in his design to defraud as well as himself, and that it was rather a combination than the act of

one person. It looks that way to me. And if the combination could be ferreted out, it might be that others might be made responsible as well as Judkis for these transactions."

The method which Judkis adopted for perpetrating the fraud mentioned was: He bought goods from a large number of wholesale concerns located out of Oregon, and generally in the East. He bought no particularly large bills from any one concern. No one creditor therefore would be sufficiently interested or near enough at hand to follow his acts closely and actively. As the goods reached Portland they were placed in a storeroom near his store, which he had rented temporarily for the purpose. His excuse for renting this storeroom was that rats infested his store and damaged his goods, and therefore a storeroom was necessary to protect his merchandise from rodents. The windows of this storeroom were covered with paper so that no one could see therein. He would then offer to sell certain lots of goods to other retail merchants in the vicinity of his store, all of whom were friends of his, including the defendant, the latter of whom had also been a partner in business transactions. The goods were usually sold at cost, or less, upon a rising market, and at a time when merchandise was scarce. The goods were always new and usually just received. The money would be retained by Judkis, or used for his purposes, but the goods were not paid for therewith, nor were merchandise creditors

paid therefrom. In one particular transaction, that of a certain lot of shoes purchased from the Mason Shoe Manufacturing Company of Chippewa Falls, Wisconsin, Horenstein, the defendant, purchased these shoes shortly after they arrived, paying therefor only invoice price, upon a rising market, scare of merchandise, and Judkis losing thereon the freight to Portland and drayage. Horenstein paid cash for these goods in the amount of $225.00, and immediately sold them to a retail merchant, (said merchant being a personal friend of Judkis and of Horenstein, and subsequent to bankruptcy an employer of the bankrupt) for a profit of $8.00 and on credit.

(Transcript p. 55.)

Other transactions were of similar character, although the origin of the goods were not so closely traced. Purchases of goods by Horenstein, the defendant, from Judkis, the bankrupt, extended over a period of three months, and aggregated approximately $1,000, so far as could be discovered, and the methods were of like character, sometimes, however, the amount being smaller.

Horenstein, the defendant, was a speculator in stocks of merchandise, claiming, according to his testimony, to "buy everything in the world." His real business was that of a barber. (Transcript p. 52.)

Some five or six other parties—retailers, and all of them personal friends of Judkis, one of them a present employer of Judkis,—purchased merchandise in quantities from him during the

same period, in a similar manner, practically all of them testifying, and practically all of them claiming that Judkis was doing a jobbing business in connection with his retail business. Salesman and sales managers from several wholesale houses in Portland, calling upon Judkis frequently in the course of their business, testified on behalf of the plaintiff that Judkis was doing a retail business and a retail business only, conducting a retail store and selling goods over the counter. (See testimony of Jacob H. Ballin of Neustadter Bros., Transcript p. 29; testimony of James Bamford of Goodyear Rubber Co., Transcript p. 36, 37, and testimony of Anselm Boscowitz of Fleischner, Mayer & Co., Transcript p. 31.) His store, it is admitted, was fitted up as a retail store, (Transcript p. 34, 37 and 50) he advertising in a newspaper sales of merchandise at retail. (Transcript p. 43.) He admits that he was doing a retail business, but that sometimes he sold at wholesale. (Transcript p. 22.) It was testified that the houses from whom he bought sold only to retailers and not to jobbers. (Transcript p. 40) and that there was no wholesale or jobbing house in the West that sold only for cash, (Transcript p. 39) although Judkis' sales were always only for cash. Horenstein admitted that he testified before the Referee in Bankruptcy that Judkis had a retail store, and that he was not in the wholesale business, but that he sold wholesale sometimes, and this statement of his was affirmed on the stand before the trial court in the present trial. (Transcript p. 54.)

Judkis frequently borrowed money from

Horenstein, the defendant,—$200, $300 or $400 at a time, and upon one occasion when he asked Horenstein to lend him more money, Horenstein told him that he did not have any money that he could let him have, so Horenstein was told by Judkis that he would sell him some merchandise whereby Horenstein could make a profit and at the same time accommodate him by letting him have a few hundred dollars, and that was the origin of the bulk purchases by Horenstein (Transcript p. 21). Judkis frequently loaned money to Horenstein and Horenstein to Judkis. (Transcript p. 52.)

The court held that such sales made by Judkis were not in contravention of the Oregon "Sales in Bulk Act" and therefore not void.

APPELLANT'S POSITION

The trustee endeavored to recover from Horenstein the value of the goods so purchased by him, claiming that they were purchased contrary to the act known generally, although perhaps improperly, as the Oregon "Sales in Bulk Act." (It is probable that the misnomer in calling this act the "Sales in Bulk Act" gave rise to the decision by the trial court which it is contended was erroneous, since the act should more properly be known as *"Sales Out of the Usual Course of Business Act.")* The trustee's position was that the sale to Horenstein by Judkis was in fraud of creditors, and being a sale out of the usual course of business, and Horenstein not having notified

creditors of Judkis of the contemplated purchase, it was void, and that the goods purchased, or their value, were recoverable by the trustee from Horenstein.

ASSIGNMENT OF ERRORS

There are seven assignments of errors. All of them, however, may be summarized into one assignment, namely:

That the sales made by Judkis to Horenstein were out of the usual course of business, and therefore void under Sections 6069 to 6072 of Lord's Oregon Laws, as amended by General Laws of Oregon, 1913, pages 537 to 540, in view of the fact that Horenstein did not demand from Judkis, the vendor, the requisite certificate prescribed by Section 6069, Lord's Oregon Laws, nor did he give the notice prescribed by Section 6070 as amended.

STATUTORY LAW OF OREGON REGARDING SALES OF MERCHANDISE

Section 6069 Lord's Oregon Laws as amended by General Laws of Oregon, 1913, page 538, provides:

> "It shall be the duty of every person who shall bargain for or purchase any goods, wares or merchandise, in bulk, * * * to demand

> and receive from the vendor thereof, * * * and at least five days before paying or delivering to the vendor any part of the purchase price or consideration therefor, or any promissory note or other evidence of indebtedness therefor, a written statement under oath containing the names and addresses of all of the creditors of said vendor, together with the amount of indebtedness due or owing, or to become due or owing, by said vendor to each of such creditors * * *."

and makes it the duty of the vendor to thus furnish such statement under oath.

Section 6070 Lord's Oregon Laws as amended, provides that the vendor shall give notice to creditors at least five days before the consummation of such sale of his purpose in making the purchase, and upon his failure to do so, "such purchase, sale or transfer shall, as to any and all creditors of the vendor, be conslusively presumed fraudulent and void."

Section 6072 Lord's Oregon Laws defines what is deemed a sale in bulk, and is as follows:

> "Any sale or transfer of goods, wares or merchandise, * * * out of the usual or ordinary course of business or trade of the vendor, or whenever thereby substantially the entire business or trade theretofore

conducted by the vendor shall be sold or conveyed or attempted to be sold or conveyed to one or more persons shall be deemed a sale or transfer in bulk, in contemplation of this act; *provided,* that nothing contained in this act shall apply to sales by executors, administrators, receivers or any public officer acting under judicial process." (The omitted portion shown by asterisks concerns only fixtures and equipment.)

Prior to the amendment of Section 6070 Lord's Oregon Laws in 1913, the section read:

"Any sale or transfer of a *stock of goods,* wares, or merchandise out of the usual or ordinary course of the business or trade of the vendor, —or whenever thereby substantially the entire business or trade theretofore conducted by the vendor shall be sold or conveyed or attempted to be sold or conveyed to one or more persons,—shall be deemed a sale or transfer in bulk, in contemplation of this act; *provided,* that nothing contained in this act shall apply to sales by executors, administrators, receivers, or any public officer acting under judicial process."

ARGUMENT

Section 6072 Lord's Oregon Laws, prior to its amendment, inhibited any sale or transfer of a *stock* of merchandise, or substantially the *entire business or trade* theretofore conducted by the vendor. The Legislature in 1913, however, *left out any reference to a stock* of merchandise, and provided as follows:

> "*Any sale* or transfer of goods, wares or merchandise * * * *out of the usual or ordinary course of business* or trade of the vendor, *or* whenever thereby substantially the entire business or trade theretofore conducted by the vendor shall be sold or conveyed or attempted to be sold or conveyed to one or more persons shall be deemed a sale or transfer in bulk * * *." (Italics ours.)

It is therefore seen that by legislative enactment the proscription against a *sale of a stock of merchandise* was broadened into a proscription against *any sale or transfer of goods, wares or merchandise out of the usual course of business;* therefore, by legislative interpretation the inhibition extends to *any sale of merchandise out of the usual course* of business, and has no reference as to whether all or nearly all, or a substantial portion of a stock of merchandise is sold. All

that is necessary under the section, as amended, in order for a sale to come under the prohibition of the statute, and to require notice to creditors, is either, (1) that the sale be out of the usual course of business, *or* (2) that it be of substantially the entire business or trade theretofore conducted by the vendor. One or the other of these requirements is sufficient.

The learned judge below seemed to eliminate the first requirement, and to treat the statute as it existed before the amendment removed the ambiguity.

It is apparent from a reading of the opinion of Judge Wolverton that the significance of this amendment was not clearly perceived by the court, as in the course of his opinion the judge says:

> "It seems to me that the spirit of this statute is to prevent persons who are dealing in merchandise from disposing of their entire stock, or of the larger proportion of it, or of such a proportion of it as will render the vendor less able to pay his obligations. I do not think it applies to small sales in bulk, or to sales that do not materially affect the vendor's solvency, if I may put it in that way. That interpretation of the statute appears from the statute itself * * *
>
> "So that sales in bulk must be read with reference to each particular business, and it must be such a sale as will indicate the vendor is in-

> tending to dispose of his entire business, or practically the entire business, or such a proportion thereof as will impair his solvency, and render him unable to pay his debts in the usual course."

It is maintained, with respectful deference to the opinion of the Judge below, that the statute as amended placed no such limitation upon the inhibited sale. It is not necessary that the sale inhibited by the statute should be such that would indicate that the vendor was "intending to dispose of his entire business, or practically the entire business, or such a proportion thereof as will impair his solvency, and render him unable to pay his debts in the usual course." On the other hand *all that is necessary is that such sale should be out of the ordinary course of business of the vendor.*

The purpose of the statute is evident. Where one, intending to defraud his creditors, sells goods out of the usual course of his business, that sale out of the usual course of business is sufficient to put the purchaser upon notice that a fraud might be contemplated. It is not customary, for example, as in the case at bar, for a retail merchant to sell a large portion of goods at cost, or below cost, to a barber or to other merchants or speculators for cash, or for that matter on credit. The fact that one conducting a retail business sells goods in quantities to another is sufficiently out of the usual course of business to put the person buying the goods on notice, and require him

to give the usual notice to creditors. If he fails to do this and closes his eyes, he must suffer the consequences. As said in the case of *Dokken v. Page, 147 Fed. 438, 439:*

> "It is full time that speculating purchasers from insolvent debtors should know that under the bankrupt act they cannot stop their ears and shut their eyes lest they may hear or see that such a merchant as Tveten was selling out his entire stock of goods in order to defeat his creditors in the collection of their just claims. Such speculators on chance seem to think that they can escape the statute by studiously and cunningly placing themselves in a position to half satisfy conscience by saying: 'I did not know the vendor was bankrupt. He did not so inform me; and I did not ask him. I did not know about his creditors, as I did not examine his books. I did not take an inventory of the goods or carefully examine them, as I had a general knowledge of their character, and did not look further'—and the like."

There has been no interpretation in Oregon of the statute as amended, or for that matter even before amendment, to the effect that it is necessary that all or substantially all of a stock of goods be sold in order to constitute a sale in bulk, as defined by the statute. In fact, the statute

specifically asserts otherwise. It is true that most of the sales which have come before the courts in Oregon, or elsewhere, were sales of an entire stock and at one time, but it does not seem consonant with the purpose of the statute that a sale of all of one's stock should be void only if made at one time, and yet sales in quantities from time to time, extending over a period, of all or nearly all of one's stock should be valid. According to the decision rendered, if a sale had been made by Judkis to a purchaser, or a group of purchasers, at one time of his entire stock, it would have been void, unless the provisions of the statute had been complied with, whereas, if Judkis had sold a third of his stock today to one person, a third of it tomorrow to another person, and a third of it the next day to another person, it would not have been void, unless a third could be construed to be practically the entire business, or such a proportion of the business as would impair solvency. It is earnestly maintained that *the test is not quantity.* The *test is whether or not the sale is out of the usual course of business* and thus calculated to excite sufficient suspicion in the mind of an honest purchaser that it might be done for the purpose of defrauding creditors. A sale in large quantities, especially a sale of all of one stock, is usually sufficiently out of the course of one's business to put a purchaser on notice, but it is not the only circumstance which might thus put one on notice. One of the two statutory tests in Oregon is whether the sale was out of the *usual course* of business; the other being whether substantially the entire business is sold. If *either*

of these two circumstances occur, notice must be given to creditors.

Prior to the enactment of the sales in bulk statutes, one of the badges of fraud usually spoken of in discussions of fraudulent conveyances of personal property was a sale out of the usual course of business. That, along with inadequacy of price, haste, the omission of the common preliminaries of negotiation, and other unusual circumstances, were mere *indica* of fraudulent purpose on the part of the seller and as against creditors were sufficient to put upon inquiry the purchaser, and if no inquiry was made, the presumption—prima facie at least—was that the sale was fraudulent. The modern statutes, restricting the sales of merchandise other than in the usual course of trade, are merely a broadening of the common law of fraud, making the presumption of fraud conclusive instead of prima facie, unless certain requirements are complied with.

WAS THE SALE TO HORENSTEIN OUT OF THE USUAL COURSE?

Applying the principles directly to the question at issue: Was a sale to Horenstein by Judkis of, for example, the Mason shoes, aggregating $225, at cost, less freight and drayage, upon a rising market, for cash, such a sale as would be sufficiently out of the usual course as to put an honest purchaser upon notice? It will be seen in this connection that there are many other

things entering into this sale than the question of quantity as stamping it out of the usual course of business:

First, it was prompted, not only by a readiness to sell and a desire to purchase the particular goods in question, *but by a need of money, openly expressed by Judkis, after a request for a loan had been denied by Horenstein.*

Second, it was a sale of new merchandise, for which there was a steady demand upon a market which was rising, and at a time when there was a scarcity of the articles.

Third, the purchase was for cash.

Fourth, they were purchased for resale in bulk at a very small margin of profit, and upon credit.

Fifth, the purchaser, Horenstein, was an intimate friend of the seller, Judkis, and the goods were resold to another friend of both parties, who after bankruptcy became the employer of the seller.

Sixth, Horenstein, himself, was not a merchant, but a barber, purchasing at times bankrupt stocks and job lots of merchandise for resale in bulk.

Were these circumstances sufficient to stamp that sale one out of the usual course of business? If it was, then all the sales to Horenstein were out of the usual course of business, and are therefore void.

Section 35 of the Bankruptcy Act of 1867 pro-

vided that if a "sale, assignment, transfer or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud." The enactment probably gave definite form to the rule existing in common law.

There are several cases in the books interpreting this section of the Bankruptcy Act, although unquestionably each case will stand or fall on its own peculiar facts.

In *Schrenkeisen v. Miller, 21 Fed. Cas. p. 733,* Case No. 12,480 (D. C. N. Y.) Stein, a manufacturer, used walnut logs for manufacturing chairs. He had on hand sixty-seven of these logs, which he sold to Miller. Said the court:

> "It is quite clear, on the testimony, that the sale to Miller was not made in the usual and ordinary course of business of Stein, as such course was known to Miller. This fact is, therefore, prima facie evidence of fraud, and throws on Miller the burden of showing that there was no violation of section 5129 of the Revised Statutes," (Sec. 35, Bankruptcy Act of 1867.)
>
> "As to Miller, there was sufficient to put him on inquiry, to ascertain the condition of the affairs of Stein, when Stein, a buyer of logs and a chair-maker, was sending to him, Miller, to come and see him, and was offering to sell him a quantity of

> logs which, so far as appears, were all the logs Stein had, and which Miller could easily have ascertained to have been only recently purchased by Stein."

In *In re Knopf, 144 Fed. 245, 248,* one Knopf was declared bankrupt. He had purchased merchandise to a considerable extent. No money was paid to his merchandise creditors. A sale of his stock was made by him to one Sanders, and the court says:

> "The rule is of general application, that any unusual transaction sufficient to excite attention and put a party on inquiry, is notice of everything to which such inquiry would have lead, and that any ignorance of the fact due to negligence is equivalent to knowledge in fixing the rights of the parties."

In *Walbrun v. Babbitt, 16 Wall. 577, 581; 21 L. Ed. 489,* which was a case arising under the Bankruptcy Act of 1867, the court says:

> "Section 35 of the bankrupt law condemns fraudulent sales equally with fraudulent preferences, and declares that, if such sales are not made in the usual and ordinary

course of business of the debtor, they should be prima facie evidence of fraud. The usual and ordinary course of Meldenson's business was to sell at retail a miscellaneous stock of goods common to country stores in a small town in the interior of the state of Missouri. It was to conduct a business of this character that the goods were sold to him, and as long as he pursued the course of a retailer, his creditors could not reach the property disposed of by him, even if his purpose at the time were to defraud them. But it is wholly a different thing when he sells his entire stock to one or more persons. This is an unusual occurrance, out of the ordinary mode of transacting such business, is prima facie evidence of fraud, and throws the burden of proof on the purchaser to sustain the validity of his purchase. Summerfield seeks to overthrow the legal presumption that Mendelson intended to commit a fraud on his creditors by showing that he paid full value for the goods in ignorance of the condition of Mendelson's affairs, but the law will not let him escape in this way. The question raised by the statute is not his actual belief, but what he had reasonable cause to believe. In purchasing in the way and under the circumstances he did, the law told him that a fraud of some kind was intended on the part of the seller, and he was put on inquiry to ascertain the true condition of Mendelson's business. This he did not do, nor did he

make any attempt in that direction. Indeed he contented himself with limiting his inquiries to the object Mendelson had in selling out, and his future purposes. Something more was required than this information to repeal the presumption of fraud, which the law raised in the mere fact of a retail merchant selling out his entire stock of goods. If this sort of information could sustain a sale, the provision of the bankruptcy law we are considering would be no protection to creditors, for any one in Mendelson's situation, and with the purpose he had in view, would be likely to give the party with whom he was dealing a plausible reason for his conduct. The presumption of fraud arising from the unusual nature of the sale in this case can only be overcome by proof on the part of the buyer that he took the proper steps to find out the pecuniary condition of the seller. All reasonable means, pursued in good faith, must be used for this purpose. If Summerfield had employed any means at all directed to this end, he would have discovered the actual insolvency of Mendelson. In choosing to remain ignorant of what the necessities of his case required him to know, he took the risk of the impeachment of the transaction by the assignee in bankruptcy in case Mendelson should, within the time limited in the statute, be declared a bankrupt."

It will be noted that in all of these cases under the former Bankruptcy Act, where sales out of the usual course of business were made only prima facie fraudulent, evidence of good faith could be introduced to repel the presumption. Under the Oregon statute, of course, the presumption of fraud is conclusive. In the two latter cases above cited, the sale was of the entire stock of merchandise, but that, of course, was not the criterion. The criterion was whether the sale in that manner was out of the usual course of business. There is no doubt that the same reasoning would have been used had any considerable quantity of the stock been disposed of, or were any other unusual circumstances connected with the sale.

In Massachusetts, for example, Section 11, Chapter 136, page 1453-4, Revised Law of Massachusetts, 1902, provides that, "If such sale, assignment, transfer or conveyance is not made in the usual and ordinary course of business of the debtor, that fact shall be prima facie evidence of such cause of belief." (i. e., cause of a belief that a preference was intended.)

In the case of *Jaquith v. Davenport, 197 Mass. 397, 401,* it became necessary to determine whether a certain sale was out of the usual course of business, so as to determine whether or not the purchaser had reasonable cause to believe a preference was intended. There a dealer in cigars and tobacco made sales of two lots of cigars—one on March 11th, 1896, and another on March 31st, 1896, aggregating $1875 and $1390 respectively, but these lots did not constitute all nor nearly all of the entire stock of the seller. A

petition in insolvency was filed against the seller on April 25th, 1896. The court, discussing the sales, determined that they were out of the usual course of business.

There is also a statute in Massachusetts concerning the sale of merchandise in bulk. This statute is much less restrictive than the Oregon statute. It was, however, held in the case of *Hart v. Brierly, 189 Mass. 598, 602, 75 N. W. 286,* that:

> "The statute test is whether the sale is made in the usual way in which a merchant, owing debts, conducts his business, or whether he takes an unusual method of disposing of his property in order to get the money for his own use and leave his creditors unpaid."

And so in *In re Calvi (D. C. N. Y.) 185 Fed 642,* it was held that under the New York statute, requiring notice to creditors, where there was a "transfer of any portion of a stock of goods, wares or merchandise, otherwise than in the ordinary course of trade, in the regular and usual prosecution of the transferrer's business, or the transfer of an entire such stock in bulk," a sale to two different purchasers of shoes in bulk, was presumptively fraudulent.

TESTIMONY

Before concluding this brief, attention generally will be called to the character of testimony adduced by the defendant in the endeavor to show that Judkis, the bankrupt, was doing a jobbing business, and therefore that the sales were in the usual course.

All the witnesses for the plaintiff, called for that purpose, testified that Judkis was in the retail business, and in the retail business only, and that the sales to Horenstein were out of the ordinary course of business.

The following witnesses for the defendant testified in this respect as follows:

Judkis, himself, claims that he was in the retail business, but that he sold wholesale sometimes, as will be seen from the following: (Transcript p. 22.)

Q. Now, what was the kind of business that was conducted by the American Clothing Company, by you doing business as the American Clothing Company?

A. I been selling retail—retail and a little doing jobbing.

Q. You were selling at retail?

A. Retail, mostly at retail and a little jobbing.

Horenstein, the defendant, likewise claimed that Judkis was a retail merchant, but that he sold wholesale sometimes. (Transcript p. 54.)

Solomon, a retail merchant who purchased goods from Judkis, testified, "Today everybody is a jobber. When I have so much of one kind or odds and ends, I sell it out at cost or below cost. I am not doing exactly a jobbing business, but when I have too much of one article I sell it to another dealer." (Transcript p. 44.)

Glickman testified (Transcript p. 55), "that Judkis had a clothing and shoe store on First Street, and used to sell retail, some wholesale, same as we did."

Meyer Wax testified that Judkis was engaged in the retail business and partly wholesale, and that Judkis' store was fitted up as a retail store.

(Transcript p. 50.)

These witnesses and the other witnesses called by the defendant, namely, L. Krause, L. Robinson and M. Wilnitsky, were personal friends of the bankrupt and of Horenstein, and all of them had made like purchases from Judkis, which, if the present suit were maintainable, would place them under the liability to refund the goods purchased by them, or their value, to the trustee. No disinterested witness was called by the defendant to show the character of Judkis' business, nor to testify that such sales as made by Judkis to Horenstein would have been in the usual course of his business.

It is very plain and apparent that Judkis was doing a retail business. It has been found and is likewise very apparent, that Judkis was planning to defraud his creditors. With that end in view, his plan was to purchase goods on credit and to dispose of them for cash as quickly as possible. Horenstein, himself, was not in the business of selling merchandise at retail. He was a barber by trade, and was buying bankrupt stocks and making quick turnovers of the stocks purchased. He and others, to whom goods were sold, were being used by Judkis as a means of defrauding his creditors, and it is inconceivable that Horenstein, under the circumstances, did not know that the sales proposed by Judkis to him, in the manner in which they were proposed, were out of the usual course of business of Judkis. The fact is, that Judkis endeavored to borrow money from Horenstein, as was his custom, but that Horenstein refused to lend him further money; whereupon Judkis proposed that he would sell him goods for cash from which he, Horenstein, could make a profit. Certainly, under these circumstances, the sale was not in the ordinary course of Judkis' business. It was a sale for the purpose of immediately raising money, and therefore out of the ordinary course.

* * * * * * * * * *

Had the trial judge perceived that a sale out of the ordinary course of business was inhibited by the statute, it is confidently asserted that he would have found that the sales were void, in that they were out of the usual course of trade. The eminent judge undoubtedly fell into an erroneous interpretation of the statute, due prob-

ably to the impression which he had of the provisions of the statute prior to its amendment.

It is therefore respectfully urged that the judgment below should be reversed.

Respectfully submitted,

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